

June 13, 2004

## **Enforcing the “Waste Management Rule”**

By  
Tom McCoy

The “Waste Management Rule” (ORS 468B) is an Oregon law that predates SB1010. It simply states that “no person shall ... cause pollution of any waters of the state...” Pollution is defined as including “alteration of the physical, chemical, or biological properties of any waters of the state, including changes in ... turbidity [or] silt ... which will or tends to render such waters harmful, detrimental or injurious to public health, safety, or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses or to livestock, wildlife, fish or other aquatic life or the habitat thereof.” Sediment run-off into waterways occurs naturally and, in that respect, sediment run-off is different from most other forms of “pollution.” However, if sediment run-off from cropland exceeds an “acceptable” level, it would be classified as “pollution” under ORS 468B.

How should ODA enforce the “Waste Management Rule” as it applies to sediment run-off from cropland? The simplest enforcement method would be to cite landowners for violating the “Waste Management Rule” if ODA finds evidence that excessive sediment run-off has occurred. If penalties for violations were sufficiently high, farmers would have a powerful motivation to prevent “excessive” sediment from leaving their fields.

There are two problems with this simple outcome-based approach. First, once sediment starts running off a field, it can not be stopped. For most other forms of “pollution,” fines have the beneficial effect of stopping the violation. However, even large fines will not stop run-off once it starts, since there is no way to do it. Excessive sediment run-off can be prevented only by taking action many months before the run-off occurs.

Second, what method will be used to determine if sediment run-off is “excessive?” Almost all sediment run-off occurs during winter storms when the soil is frozen or during severe thunderstorms during the summer. Many of these storms are very severe and no economically feasible farming method exists that will stop large amounts of sediment from running off fields during severe storms. A reasonable definition of “excessive” run-off must account for the severity of the storm, but how?<sup>1</sup>

I believe successful enforcement of the “Waste Management Rule” must focus on requiring preventive measures to be taken before the storms. The analogy that seems most appropriate is way the State of Oregon enforces driving laws during periods of snow

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<sup>1</sup> The difficulty in identifying “excessive run-off” is compounded because farmers often use multi-year rotations (to control weeds and disease) that reduce average erosion to acceptable levels but can produce low residue in a particular year of the rotation. Examples include the use of a low-residue spring crop or an occasional clean-tillage year. Any reasonable enforcement procedure can not rely simply on the amount of observed sediment run-off. It must consider the rotations being used.

and ice. During the rest of the year, if I cross the centerline and hit another car, I will be cited for reckless driving (or worse). I am held accountable for the outcome. However, if an accident happens when the roads are icy, the law enforcement officers recognize I may not be able to prevent a bad outcome and I will be cited only if I have not taken the *required preventive actions*. During periods of snow and ice, the police require chains, snow tires or other “traction devices.” Any motorist who drives a car without the required equipment will be cited even if the motorist does not have an accident. Since almost all sediment run-off occurs during extreme weather events, the same focus on preventive action is appropriate. If it is determined that “excessive” run-off has occurred in a watershed, the ODA should not cite the landowner, but rather it should increase the required preventive actions. The landowner should be cited only if he has not taken the required preventive actions.

Because most farmers have lived through the floods that periodically occur in Eastern Oregon, they are nervous about the kind of outcomes-based approach that ODA has suggested it will use to enforce the “Waste Management Rule.” When severe storms occur, we hate the sediment run-off, but can do nothing to stop it. If ODA is going to cite us for bad outcomes, it must develop a workable definition of “excessive run-off” that adequately takes into account the severity of the storm in a particular location. Given the current lack of weather data for particular locations, it seems doubtful that a workable definition can be developed. If ODA’s objective is to stop excessive sediment run-off, the focus of its efforts should be on requiring adequate preventive actions.